

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

BURKE REALTY COMPANY, INC.)	
)	
COMPLAINANT)	
)	
v.)	CASE NO. 97-323
)	
KENTUCKY TURNPIKE WATER)	
DISTRICT)	
)	
DEFENDANT)	

ORDER

Burke Realty Company, Inc. ("Burke Realty") has moved to limit discovery on and the introduction of evidence about Gerald P. Burke's past employment with Kentucky Turnpike Water District ("Kentucky Turnpike"). Kentucky Turnpike has moved to quash a subpoena duces tecum served upon Raymond Abell or, in the alternative, to limit further discovery on and the introduction of any evidence related to certain matters. The parties have submitted responses in opposition to the opposing party's motion. Intervenor John Miller and Richard Haarman have submitted a response in support of Burke Realty's motion. Having considered the motions and responses thereto, the Commission finds that, with limited qualifications, both motions should be granted and the scope of discovery and evidence to be considered should be limited.

This proceeding involves an administrative complaint against Kentucky Turnpike for alleged violations of KRS 278.160. Burke Realty alleges that Kentucky Turnpike is assessing certain rates and imposing certain conditions of service that are not set forth in the utility's filed rate schedules. More specifically, it alleges that Kentucky Turnpike refuses

to extend water service to certain real estate subdivisions which it owns in Bullitt County, Kentucky, unless an "impact fee" of \$1,800 per residence is paid and that such fee is not set forth in Kentucky Turnpike's rate schedules.

While the issue in controversy is narrow, the parties have engaged in discovery that extends far beyond the issue before the Commission. Kentucky Turnpike has sought information regarding Gerald P. Burke's previous employment with Kentucky Turnpike as a Commissioner and District Manager. It alleges that Burke, who is one of Burke Realty's shareholders, engaged in improper and illegal conduct while serving as a member of Kentucky Turnpike's Board of Commissioners, and then as its District Manager. As a result of such conduct, Kentucky Turnpike further alleges, "Burke, as President and shareholder in Burke Realty Company, has 'unclean hands' and is thus barred from seeking the relief sought." Kentucky Turnpike's Response to Motion in Limine at 2.

In response, Burke Realty has sought information regarding the conduct and activities of Raymond Abell, Kentucky Turnpike's present District Manager, and of the present members of Kentucky Turnpike's Board of Commissioners. Its efforts are intended to show that Kentucky Turnpike continues to follow the same standards of conduct that existed during Burke's tenure and that, if the water district presently has financial problems, such problems are the result of its present management.

Based upon its review of the existing record, the Commission finds that both parties have gone beyond the permissible scope of discovery. The sole issue in this proceeding is whether Kentucky Turnpike has violated KRS 278.160, which codifies the "filed rate doctrine." KRS 278.160 requires a utility to file with the Commission "schedules showing all rates and conditions for service established by it and collected or enforced," KRS

278.160(1), and prohibits a utility from assessing or demanding "a greater or less compensation for any service rendered or to be rendered than that prescribed in its filed schedules." KRS 278.160(2).¹ None of the discovery requests at issue address this issue nor will they lead to the discovery of admissible evidence. Simply put, neither Burke's conduct nor that of Kentucky Turnpike's present management is relevant to whether Kentucky Turnpike is assessing the alleged "impact fee" and whether such fee is contained in Kentucky Turnpike's rate schedule.

The Commission finds no legal authority to support Kentucky Turnpike's contention that Burke's alleged misconduct is relevant as a potential defense to Burke Realty's complaint. While Burke's alleged conduct might establish the defense of equitable estoppel or "unclean hands," such defenses are not available in the present case. Courts have long held that neither equitable considerations nor a utility's negligence may serve as a basis for departing from filed rate schedules. Boone County Sand & Gravel Co. v. Owen County Rural Elec. Co-op. Corp., Ky.App., 779 S.W.2d 224 (1989).

IT IS THEREFORE ORDERED that:

1. Burke Realty's Motion in Limine is granted in part and denied in part.

¹ Interpreting similarly worded statutes from other jurisdictions, courts have held that utilities must strictly adhere to their published rate schedules and may not, either by agreement or conduct, depart from them. Corporation De Gestion Ste-Foy v. Florida Power and Light Co., 385 So.2d 124 (Fla. Dist. Ct. App. 1980). See also, Haverhill Gas Co. v. Findlen, 258 N.E.2d 294 (Mass. 1970); Laclede Gas Co. v. Solon Gershman, Inc., 539 S.W.2d 574 (Mo. App. 1976); Capital Properties Co. v. Pub. Serv. Comm'n, 457 N.Y.S.2d 635 (N.Y. App. Div. 1982); West Penn Power Co. v. Nationwide Mut. Ins. Co., 228 A.2d 218 (Pa. Super. Ct. 1967); Wisconsin Power & Light Co. v. Berlin Tanning & Mfg. Co., 83 N.W.2d 147 (Wis. 1957). A similar rule applies to the published rate schedules of common carriers. Sallee Horse Vans, Inc. v. Pessin, Ky.App., 763 S.W.2d 149 (1988).

2. Kentucky Turnpike is prohibited from conducting further discovery on and introducing any evidence about Gerald P. Burke's past employment with Kentucky Turnpike except as such evidence directly involves Kentucky Turnpike's formulation and execution of any policies related to the assessment of an impact fee.

3. Kentucky Turnpike's Motion to Quash Subpoena is denied.

4. Kentucky Turnpike's Motion in Limine to Limit Discovery and Evidence is granted.

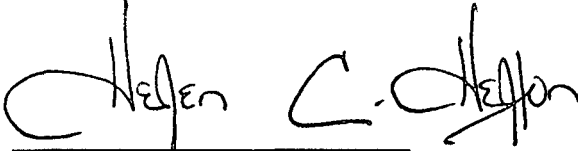
5. Burke Realty is prohibited from conducting further discovery on and introducing any evidence about Raymond Abell's computer internet use, Kentucky Turnpike's Green Jeep Cherokee, or Raymond Abell's outside employment.

Done at Frankfort, Kentucky, this 9th day of March, 1998.

PUBLIC SERVICE COMMISSION


For the Commission

ATTEST:


Executive Director